STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7213

Joint Petition of Green Mountain Power Corporation, Northern New England Energy Corporation (NNEEC), and Northstars Merger Subsidiary Corporation (Northstars) for approval of: (1) the merger of Northstars into and with Green Mountain Power; (2) the acquisition by NNEEC of the common stock of Green Mountain Power; and (3) the amendment to Green Mountain Power's Articles of Incorporation	))))))))))

Order entered: 11/17/2006

ORDER RE: MOTION FOR SUMMARY JUDGMENT

On October 13, 2006, AARP requested that the Vermont Public Service Board ("Board") grant partial summary judgment and rule that the Green Mountain Efficiency Fund ("Efficiency Fund") proposed by the Petitioners (Green Mountain Power Corporation ("GMP" or "Company"), Northern New England Energy Corporation ("NNEEC"), and Northstars Merger Subsidiary Corporation ("Northstars")) is inconsistent with the Board's previous Order of January 23, 2001, in Docket 6107 (the "Docket 6107 Order"). AARP also asserts that, because the Efficiency Fund is a necessary part of the petition and does not comport with the legal requirements of the Docket 6107 Order, the petition should be dismissed. The Petitioners and the Department of Public Service ("Department") oppose AARP's Motion.

In this Order, we deny AARP's Motion for Summary Judgment. AARP has not demonstrated that, as a matter of law, the Efficiency Fund proposed by the Petitioners is legally deficient. More specifically, we conclude that, while the Docket 6107 Order established "a mechanism by which ratepayers will share in the above-book proceeds of any future sale or

merger of the Company,"[1] it did not finally decide how that sharing would occur. We find unpersuasive AARP's arguments that allowing GMP to earn a return on the money invested through the Efficiency Fund runs afoul of the sharing mechanism; it is possible that after further description of the Efficiency Fund, we will conclude that it is not consistent with the Docket 6107 Order, but we cannot find (without further examination of relevant factual issues) that it conflicts with that Order.

Background

In Docket 6107, we considered a request from GMP for a 12.9 percent increase in its rates. One of the significant issues in that proceeding was the rate treatment of the contract between Hydro-Quebec and the Vermont Joint Owners (the "HQ Contract") (which included GMP). The Board had previously found that the HQ Contract was not used-and-useful and that GMP's decision to lock into the HQ Contract early was imprudent.[2] In a proposed settlement of Docket 6107, both GMP and the Department agreed that the Board should find the contract to be used and useful and that the Board should not subject GMP to any further disallowance based on GMP's imprudent early lock-in to the HQ Contract. We accepted these parties' recommendation with regard to prudence and affirmatively stated that we would require no further disallowances based upon the Company's imprudence.[3] However, we also concluded that we could not then rule that the HQ Contract was used-and-useful, particularly in light of our previous ruling in Docket 5983 and the fact that the HQ Contract still was not used-and-useful under the applicable standard. Nonetheless, we concluded that "it is proper to treat it [the HQ Contract] *as if it were used-and-useful*."[4] We reached this conclusion largely because of our concern about GMP's overall financial situation, which necessitated approval of rates in excess of those that would

1. *In re Green Mountain Power Corp.*, Docket 6107, Order of 1/23/01 at 109.
2. *In re Green Mountain Power Corp.*, Docket 5983, Order of 2/27/98.
3. Docket 6107, Order of 1/23/01 at 79.
4. *Id.* at 80 (emphasis in original).

occur if we applied a traditional cost-of-service methodology. As we made clear, the HQ Contract was only one factor contributing to GMP's financial woes[5]:

> These higher rates are necessitated by the risks to GMP's customers from the Company's dire financial situation, a situation that has resulted from GMP's own management decisions. Among the most damaging was GMP's decision to invest heavily in unregulated activities, investments undertaken solely for the benefit of shareholders and not for ratepayers. (Had those investments proven wise, shareholders rather than ratepayers would have received the returns.) As a result of these hugely unprofitable unregulated activities, as well as GMP's decision to continue paying (until recently) unjustifiably high dividends and the Company's imprudent early lock-in to the HQ-VJO Contract, GMP's financial viability now requires the collection of revenues higher than those calculated by routine rate-setting methodologies.
>
> Ratepayers are thus providing, through additional rates, the funding for GMP to recover from a financial crisis that is largely of its own making.[6]

We also recognized that fairness to ratepayers compelled us to balance the special ratemaking treatment that we employed with a mechanism to return to ratepayers a portion of a future financial windfall from a later sale or acquisition. As we explained:

> The rates we approve today will require GMP's ratepayers to pay for costs that might be disallowed under routine ratemaking methodologies. Although we consider this outcome necessary for the good of ratepayers, we also find it necessary and appropriate to balance this result with a mechanism designed to protect ratepayers against a risk of unfair payments if our decision leads to unjust enrichment or windfall profits at the time of a potential future sale of some or all of GMP's assets or a potential merger. Therefore, in the event of an acquisition, disposal of GMP's assets, or merger at a price in excess of book value, today's Order provides that stockholders and ratepayers will share equally in any such premium, up to a maximum amount (for ratepayers) of $8 million.[7]

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5. GMP's suggestion that the change in the value of the HQ Contract changes the considerations in Docket 6107 fails to consider the significant role of these other factors in the need for special rate treatment and the windfall-sharing mechanism.

6. *Id*. at 108–109.

7. *Id*. at 9.

This ruling made clear that the sharing mechanism must be designed to ensure that the amount due to ratepayers be solely for their benefit.

As part of the merger and acquisition in this proceeding, GMP has proposed the Efficiency Fund "to invest the amount of the 'windfall sharing mechanism,' established by the Vermont Public Service Board in Docket No. 6107, in projects that would return net benefits to customers."[8] Under GMP's proposal, GMP would voluntarily invest in demand-side management and other efficiency programs, including (among others) distributed generation and renewable generation. GMP also proposes to invest only where the project has a net benefit under the societal cost analysis.[9]

Parties' Positions

AARP contends that the proposed Efficiency Fund is inconsistent with the Board's ruling in Docket 6107 and must be rejected. According to AARP, even though GMP plans to invest the $9.2 million in projects to benefit ratepayers, GMP also proposes that the investments would be added to ratebase. AARP argues that the purpose of the windfall sharing mechanism was to avoid unjust enrichment of shareholders. By adding the investment to ratebase and allowing GMP to obtain both a return on and a return of the $9.2 million investment, AARP asserts, shareholders are actually providing no value. Instead, they will be fully compensated for their investment. AARP contends that this runs afoul of the Board's Docket 6107 Order, which, it states, required not only that the windfall be returned to ratepayers but also that those funds come from stockholders. Furthermore, AARP maintains that because Docket 6107 definitively mandated that shareholders provide the funds that will be returned to ratepayers, both claim and issue preclusion apply and prevent relitigation of that issue.

GMP asserts that the Board should deny AARP's motion because it inadequately explains the basis for the contention that claim and issue preclusion apply or why it is entitled to summary judgment. In addition, GMP maintains that the proposed Efficiency Fund meets the requirements

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8. Exh. GMP-CLD-3 at 1. As of the time of the prefiled testimony, GMP proposed to invest $9.2 million in the fund, which reflects the original $8 million cap adjusted for inflation. Dutton pf. at 19–20.

9. *Id*. at 1.

of Docket 6107 in that the net value returned to ratepayers will equal or exceed the $9.2 million required by that Docket. GMP also asserts that claim and issue preclusion do not represent a bar. As to claim preclusion, GMP argues that the subject matter and the causes of action of the two cases are different. Furthermore, GMP contends that issue preclusion does not apply because one of the required elements — fairness — has not been met. According to GMP, facts have changed since the Board's decision in Docket 6107 so that it cannot now be claimed that shareholders obtained a windfall; these changes, argues GMP, mean that it would be inequitable to apply the Docket 6107 decision as AARP argues. Finally, GMP asserts that there are genuine issues of material fact.

NNEEC and Northstars join in GMP's response. They further contend that AARP's filing fails to meet the standards required for a Rule 56 motion. NNEEC and Northstars argue that the Board did not finally resolve all issues related to the windfall-sharing mechanism, but rather reserved for itself substantial discretion. In addition, NNEEC and Northstars aver that the Board has great latitude in interpreting and enforcing its orders.

The Department asserts that the central issue in this proceeding, which it characterizes as how to meet the requirements of Docket 6107's windfall sharing mandate, was not decided in that earlier docket. Instead, according to the Department, the Board deferred the design of the windfall sharing mechanism until a subsequent proceeding. Because of the absence of a prior decision on the issue raised by AARP, the Department maintains that issue and claim preclusion do not apply and the motion for summary judgment must be denied.

Standard

Under V.R.C.P. Rule 56, the Board may grant summary judgment if the movant can demonstrate that "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."[10] In a summary judgment the movant has the burden of proof, and the party opposing the summary judgment motion is to be given the benefit of all reasonable

10. *Granger v. Town of Woodford*, 167 Vt. 610, 611, (1998) (mem.); *Bacon v. Lascelles*, 165 Vt. 214, 218, (1996); *Hoeker v. Department of Social and Rehabilitation Service and Sally Lindberg*, 2000WL 1644525 (VT)(2000).

doubts and inferences in determining whether a genuine issue exists.[11] We also regard allegations made in opposition to summary judgment as true, if supported by affidavits or other evidence.[12]

Discussion

AARP's motion rests largely on its characterization of our decision in Docket 6107. An examination of that decision demonstrates that we did not definitively establish the characteristics of the windfall-sharing mechanism. Instead, we deferred a decision on the procedure by which windfall sharing would occur to a subsequent proceeding. The absence of a final ruling on the design of the windfall-sharing mechanism, which necessarily involves the source of funds and the manner in which restitution to ratepayers occurs (the specific issues raised by AARP), means that claim and issue preclusion cannot apply. Furthermore, because we deferred substantive review of the windfall-sharing procedure to a subsequent docket, it is obvious that genuine issues of material fact related to that design remain, so that summary judgment is inappropriate.

In the Docket 6107 Order, we found that GMP's shareholders would benefit from our decision to set rates on a basis other than a traditional cost-of-service analysis. We concluded that this created the potential for a financial windfall to GMP's shareholders if GMP were subsequently acquired by another company at a price in excess of book value. Accordingly, we ruled that:

> To avoid such unjust enrichment, and in consideration of ratepayers who will pay higher rates than are justified by routine rate-making procedures, we find it essential that the rates approved today be accompanied by a mechanism by which ratepayers will share in the above-book proceeds of any future sale or merger of the Company, or sale of its regulated assets.[13]

This requirement does not mandate that shareholders provide specific funds to ratepayers. Instead, our conclusion was simply that, if ratepayers shared in the above-book proceeds, a

11. *Hodgdon v. Mt. Mansfield Co.*, 159 Vt. 150, 158-159 (1992).
12. *Peters v. Mindell*, 159 Vt. 424, 426 (1992).
13. Docket 6107, Order of 1/23/01 at 109.

financial windfall would be avoided. Our description of the windfall-sharing requirement in the introduction is similar:

> in the event of an acquisition, disposal of GMP's assets, or merger at a price in excess of book value, today's Order provides that stockholders and ratepayers will share equally in any such premium, up to a maximum amount (for ratepayers) of $8 million.[14]

Consistent with the description set out in the Order, the paragraph focuses on the sharing of above-book sales proceeds with ratepayers. It is silent as to the source of the funds and how any sharing must occur.

Significantly, the specific condition in the Board's Order also speaks to a mandate that ratepayers receive a share of the above-book proceeds of any sale, rather than the source of those proceeds or how ratepayers will receive them. Specifically, condition 25 of the Order mandates as follows:

> 25. As is more fully described in Section IV.G of this Order, GMP's ratepayers shall receive fifty percent of the above-book proceeds of any sale or merger of GMP, or sale of its regulated assets, subject to a cumulative limit of $8 million, such limit to be adjusted for inflation. GMP shall notify this Board no later than February 14, 2001, as to whether GMP requests a prompt Board investigation into the specific design of the procedure by which the windfall sharing is to be implemented.[15]

Based upon these passages, we cannot conclude, as AARP argues, that our Order mandated that shareholders provide funds to ratepayers or that the return of proceeds occur in any particular manner.

This conclusion is further reinforced by our description in Docket 6107 of the specific elements of the windfall sharing plan. We delineated the triggering event: a sale, merger or acquisition at above-book value. We also defined the beneficiaries — ratepayers — and how the amount to be shared with ratepayers would be calculated. However, we did not decide on the

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14. *Id*. at 9.
15. *Id*. at 124.

specific mechanism by which "restitution" would occur.[16] Instead, we stated that we would establish the restitution method later, observing that:

> We leave it to the discretion of GMP whether the specific design of the procedure will be determined at the time of the first triggering event, or instead in a new investigation to be opened promptly, if the Company so petitions.[17]

Paragraph 25 of the Order, quoted above, reflects this same concept. Thus, although we made clear that the proceeds must be shared with ratepayers, we left open how that sharing could occur.

This analysis of the Docket 6107 Order demonstrates that the Board did not define the specific elements of the windfall-sharing obligation. Instead, we deferred the details of the windfall-sharing procedure to a subsequent proceeding. We thus conclude that one of the material facts that AARP relies upon — the specific mandate in the Docket 6107 Order — does not exist. Moreover, our decision to defer ruling on the windfall-sharing procedure means that both factual and policy questions relating to GMP's proposed Efficiency Plan remain, including the broad question raised by AARP's motion as to whether it is consistent with the Docket 6107 Order. The absence of a final resolution of the sharing procedure also means that neither claim nor issue preclusion applies here.

Conclusion

For the foregoing reasons, we deny AARP's motion.

16. *Id*. at 115–116. In fact, in that Docket, AARP had proposed a mechanism for the windfall sharing. We affirmatively rejected this proposal, finding that the record was insufficient. *Id*. at 111.

17. *Id*. at 116.

SO ORDERED.

Dated at Montpelier, Vermont, this 17th day of November, 2006.

s/James Volz	)	
	)	PUBLIC SERVICE
	)	
s/David C. Coen	)	BOARD
	)	
	)	OF VERMONT
s/John D. Burke	)	

OFFICE OF THE CLERK

FILED: November 17, 2006

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)